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IN THE

Supreme Court of the United States

426

AETNA CASUALTY AND SURETY COMPANY,
Petitioner,

vs.

PACIFIC EMPLOYERS INSURANCE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

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AETNA CASUALTY AND SURETY COMPANY,
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vs.

PACIFIC EMPLOYERS INSURANCE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The defendant-petitioner, Aetna Casualty and Surety Company Petitions this Court for a writ of certiorari to review a judgment and order of the United States Court of Appeals for the Sixth Circuit, dated May 21, 1970, petition for rehearing denied June 17, 1970.

Opinions in the Courts below.

None of the opinions and orders below are reported.

1) The opinion of United States District Court for the Eastern District of Michigan, (August 14, 1968), Talbot Smith, Jr., is included herein as Appendix A.

2) The Per Curiam Order of the United States Court of Appeals for the Sixth Circuit (May 21, 1970) is included herein as Appendix B.

3) The Order denying Petition for Rehearing (June 17, 1970) is included herein as Appendix C.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The Court of Appeals for the Sixth Circuit entered its Per Curiam Order on May 21, 1970 affirming the Judgment of the United States District Court for the Eastern District of Michigan, granting Summary Judgment to Pacific Employers Insurance Company.

Both parties to the appeal petitioned for rehearing to the Court of Appeals for the Sixth Circuit, and both petitions were denied by an order entered June 17, 1970. Mandate of the Court of Appeals was stayed to August 1, 1970 by an order entered by the Court of Appeals on July 2, 1970.

The Statute which confers Jurisdiction on this Court is 28 USC § 1254 (1).

THE QUESTIONS PRESENTED FOR REVIEW

FIRST

WHETHER A FEDERAL DISTRICT COURT HAS OR SHOULD EXERCISE DECLARATORY JUDGMENT JURISDICTION WHEN BEFORE ITS JUDGMENT BECOMES MEANINGFUL A DECISION OF A STATE ADMINISTRATIVE AGENCY IS NECESSARY, STATE ADMINISTRATIVE AGENCIES HAVE ADEQUATE PROCEDURES TO DETERMINE ALL OF THE QUESTIONS THAT ARE RAISED BY THE COMPLAINT FOR DECLARATORY RELIEF, AND THE PARTY SEEKING DECLARATORY RELIEF IN THE FEDERAL COURTS SOUGHT THE RELIEF PROVIDED BY STATE ADMINISTRATIVE AGENCIES WHILE THE DECLARATORY JUDGMENT WAS PENDING IN THE FEDERAL COURTS?

SECOND

WHEN PLEADINGS BY A DEFENDANT SEEKS AFFIRMATIVE RELIEF BY WAY OF REFORMATION OF POLICIES OF INSURANCE BECAUSE OF MISTAKE OF LAW, THE STATE LAW APPLICA-

BLE ALLOWS FOR REFORMATION OF CONTRACTS BECAUSE MISTAKE OF LAW, AND THE ALLEGATIONS SEEKING REFORMATION ARE UNOPPOSED BY ANY OATH BEARING EVIDENCE, IS IT ERROR TO GRANT SUMMARY JUDGMENT?

THIRD

WHEN THE AFFIDAVITS IN SUPPORT OF A SUMMARY JUDGMENT AND THE POLICIES INVOLVED ALLOW FOR MORE THAN ONE INFERENCE REGARDING THE INTENT OF THE PARTIES AND THE INTENT OF THE PARTIES IS DETERMINED BY THE INTENT OF ONE PERSON WHO WAS AN AGENT COMMON TO BOTH PARTIES AND THERE IS NO OATH BEARING EVIDENCE FROM THIS PERSON, AND ALLEGATIONS AS TO THIS PERSON'S INTENT ARE UNOPPOSED BY ANY OATH BEARING EVIDENCE, WAS IT ERROR TO ALLOW SUMMARY JUDGMENT BASED UPON A CONCLUSION OF THE INTENT OF THE PARTIES?

THE STATUTES INVOLVED IN THIS CASE

Declaratory Judgment Act

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any Court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." 28 USC §2201

Michigan Workmen's Compensation Act

"Sec. 1. Every employer subject to the provisions of this act shall adopt, . . . , one of the following methods for payment of compensation under this act.

* * *

Second, To insure against such liability in any employer's liability company authorized to take such risks in the State of Michigan; . . . ,

. . . .

Every insurance company . . . issuing an insurance policy to cover any employer not permitted to carry his own risk . . . ; shall in one and the same policy of insurance, insure, cover and protect all the businesses, employees, enterprises and activities of such employer, and each and every policy of insurance covering workmen's compensation in this State shall contain the following provisions:

Scope of contract. (d) That this insurance contract or policy shall for all purposes be held and deemed to cover all the businesses the said employer is engaged in at the time of the issuance of this contract or policy and all other businesses, if any, said employer may engage in during the life thereof, and all employees the said employer may employ in any of his business during the period covered by this policy;

Obligations assumed. (e) That it hereby assumes all obligations imposed upon the said employer by his acceptance of the Michigan workmen's compensation law, as far as the payment of compensation, death benefits, or for medical, surgical or hospital care or medicine is concerned."; Michigan Compiled Laws 1948 § 414.1, MSA § 17.195

"All questions arising under this Act shall be determined by the compensation commission." Michigan Compiled Laws, 1948, § 413.6, MSA § 17.190

"(1) All questions arising under this Act shall be determined by the workmen's compensation department.

(2) The department shall be deemed to be an interested party in all workmen's compensation cases in questions of law." MSA, 1968 Cum. Supp. 17.190

"Upon the filing with the compensation commission, by any party in interest, of any application in writing stating the general nature of any claim as to which any dispute or controversy may have arisen, the commission shall set the case for hearing and shall designate one of its members or deputy members to hear the case." Michigan Compiled Laws, 1948 413.7, MSA 17.181

STATEMENT OF THE CASE

This is a Declaratory Judgment action seeking alternative relief brought by Pacific Employers Insurance Company against Aetna Casualty and Surety Company, the surviving widows and children of Geoffrey C. Scarratt and Clair W. Curry and the regular employers of Mr. Scarratt and Mr. Curry, Jebbco Corporation, and Jim Robbins Company, respectively.

Motion for Summary Judgement was brought by Pacific Employers Insurance Company. Defendant Aetna Casualty and Surety Company brought two separate Motions for Summary Judgment of dismissal. The District Court denied both Motions brought by defendant, Aetna Casualty and Surety Company, but granted the Motion of plaintiff, Pacific Employers Insurance Company, for one of the alternatives prayed for in the Complaint.

Defendant Aetna Casualty Company took an Appeal from the denial of its two Motions for Summary Judgment of dismissal and the granting to plaintiff, Pacific Employers Insurance Company, Summary Judgment declaratory relief. Pacific Employers Insurance Company took an Appeal from the Judgment allowing its Motion for Summary Judgment.

The Court of Appeals for the Sixth Circuit affirmed the Judgment of the District Court by entering a Per Curiam Order. Both parties to the appeal sought a rehearing, and both parties were denied a rehearing. Aetna Casualty and Surety Company now seeks a writ of certiorari to review the determination of the Court of Appeals.

The problems involved in this situation came about because of the issuance of two policies of workmen's compensation liability insurance and the filing of declarations of insurance coverage with the Michigan Workmen's Compensation Department by two insurance carriers for one employer, the Jim Robbins Company, for the same period July 1, 1966 to July 1, 1967.

The Michigan Workmen's Compensation Act requires that an insurance company insure all of an employer's workmen's compensation obligation, thus, the sharing of an employer's workmen's compensation obligation by insurance companies is prohibited: Workmen's Compensation Act, Part IV, Section 1, Michigan Compiled Laws '48 § 414.1, MSA § 17.195.

See also *Lash* vs. *Coffee Cup Cafe*, 269 Mich. 470 (1941) and *New Amsterdam Casualty Co.* vs. *Moss*, 312 Mich. 459 (1945).

On September 26, 1966, while the policies of Pacific Employers Insurance Company and Aetna Casualty and Surety Company purporting to provide workmen's compensation coverage to Jim Robbins Company were in effect, the policy of Pacific Employers Insurance Company also granting workmen's compensation coverage to Jim Robbins Seat Belt Company, Jebbco Corporation, Robbins Land Company and Robbins Realty Company, there was an airplane crash in Platte, South Dakota. This crash occurred shortly after take

off from an airfield on the Flying R Ranch. It involved an airplane owned by Jim Robbins Company and it took the lives of Jim Robbins, Geoffrey C. Scarratt, Clair W. Curry and two others not involved in this action.

Jim Robbins was the President of the Jim Robbins Company. Geoffrey C. Scarratt was the Plant Manager of Jebbco Corporation and Clair W. Curry was the Superintendent of Maintenance of Jim Robbins Company. The Flying R Ranch, on the date of the crash, was owned by the Robbins Land Company and had as a part of its facilities an airfield where, shortly prior to the crash, Mr. Scarratt and Mr. Curry were doing manual labor.

Following the deaths of Scarratt and Curry, plaintiff, Pacific Employers Insurance Company voluntarily commenced paying workmen's compensation death benefits to the widows of Scarratt and Curry.

On May 13, 1968, Pacific Employers Insurance Company filed its Complaint seeking a Declaratory Judgment asking that it be declared that defendant, Aetna Casualty and Surety Company, owed workmen's compensation death benefits to the surviving widows and children of Mr. Scarratt and Mr. Curry and that Pacific Employers Insurance Company be declared not to owe any workmen's compensation benefits to the survivors of Mr. Scarratt and Mr. Curry or alternatively that Pacific Employers Insurance Company and Aetna Casualty and Surety Company are equally responsible for workmen's compensation death benefits to the survivors of Mr. Scarratt and Mr. Curry. The survivors of Mr. Scarratt and Mr. Curry and their regular employers, Jebbco Corporation and Jim Robbins Company, also were made defendants.

Aetna Casualty and Surety Company answered the Complaint admitting the issuance of its policy of workmen's

compensation insurance to the Jim Robbins Company for the period July 1, 1966 to July 1, 1967 and contending that the policy was issued because of a mistake of law of one Henry Hollister, and agent common to both plaintiff and Aetna Casualty and Surety Company. The Answer further contended that whether there was an obligation to pay workmen's compensation benefits was a determination that could be made only by Michigan workmen's compensation administrative agencies. As affirmative matter Aetna Casualty and Surety Company asked that if the Complaint were not dismissed that the policies of Pacific Employers Insurance Company and Aetna Casualty and Surety Company, as they applied to Jim Robbins Company for the period July 1, 1966 to July 1, 1967, be reformed because of the mistake of law of the common agent so as to comply with equity and good conscience.

The mistake of law alleged was that the agent common to both insurers, who previously had separately placed insurance with Aetna Casualty and Surety Company for a corporation known as Commander Aviation, Inc., thought that he could continue to separately place such insurance with Aetna for the activities of Commander Aviation, Inc., although that corporation had been dissolved and its activities made a part of the Jim Robbins Company.

Shortly after making answer to the Complaint, defendant, Aetna Casualty and Surety Company, moved for a Summary Judgment of dismissal, contending that the only authority to decide whether compensation benefits were owed was in the state administrative agencies, that this decision was administrative and not judicial and that without such a decision the matter was hypothetical, and, thus, there was no case or controversy.

Pacific Employers Insurance Company made an Answer

to the Motion for Summary Judgment of Aetna Casualty and Surety Company and made its own Motion for Summary Judgment.

The Motion for Summary Judgment of Aetna Casualty and Surety Company was denied on November 4, 1968, and Pacific Employers Insurance Company's Motion for Summary Judgment was taken under advisement.

While Pacific Employers Insurance Company's Summary Judgment Motion was still pending, Aetna Casualty and Surety Company made a second Motion for Summary Judgment contending that under the facts as reflected in the pleadings and new developments since the denial of its Motion for Summary Judgment the Complaint could not afford complete relief and would not finally settle any controversy. The new matters alleged in Aetna's second Motion for Summary Judgment were that the widow of Mr. Scarratt had brought a workmen's compensation claim seeking death benefits from Lebbeo Corporation, that administrators of the estates of both Mr. Scarratt and Mr. Curry had brought wrongful death actions against the Jim Robbins Company, among other defendants, and that another insurer could be involved as the facts as pleaded could allow for the conclusion that at the time of their deaths Mr. Scarratt and Mr. Curry or either of them could have been in the employ of James M. Robbins, and at the time of their deaths James M. Robbins, as an individual, was insured for workmen's compensation liability by another insurance company.

Pacific Employers Insurance Company moved to strike the second Motion for Summary Judgment. The District Court denied both the Motion to Strike and Aetna Casualty and Surety Company's second Motion for Summary Judgment.

Following decision on the second Motion for Summary Judgment and the Motion to Strike that Motion, the District Court decided the matter under advisement, granting the Motion for Summary Judgment of Pacific Employers Insurance Company in a written opinion. A Judgment based upon that opinion was entered September 18, 1969.

In the opinion the District Judge concluded that Michigan workmen's compensation tribunals had sole jurisdiction to determine liability for workmen's compensation benefits and that the District Court could decide only which of the two insurance companies was liable in the event these tribunals found liability to be present. The District Judge further concluded that the contention of Aetna Casualty and Surety Company that there should be reformation could not be granted because the policies expressed the intent of both Aetna Casualty and Surety Company and Pacific Employers Insurance Company and that no amount of reformation could solve the conflict between the intent of the parties and the requirements of the Workmen's Compensation Act. Then the District Judge directed that Summary Judgment be entered on the alternate prayer for relief of Pacific Employers Insurance Company that in the event of liability the obligation should be shared equally by Pacific Employers Insurance Company and Aetna Casualty and Surety Company.

Aetna Casualty and Surety Company filed Notice of Appeal from all of the determinations adverse to it on September 30, 1969. Pacific Employers Insurance Company filed Notice of Appeal from the granting of its Motion for Summary Judgment on October 17, 1969.

The Court of Appeals for the Sixth Circuit affirmed the Judgment of the District Court and denied petitions for rehearing filed by both parties to the appeal.

Aetna Casualty and Surety Company seeks a writ of certiorari to review the Judgment of the Court of Appeals.

THE BASIS FOR FEDERAL COURT JURISDICTION

Jurisdiction is based upon Diversity of Citizenship, Art. III, § 2, Constitution of the United States, and the Declaratory Judgment Act, 28 USC § 2201.

ARGUMENT

THE COURT OF APPEALS HAS IGNORED DECISIONS OF THIS COURT DEALING WITH WHETHER THERE IS JURISDICTION TO GRANT DECLARATORY RELIEF OR WHETHER DECLARATORY JUDGMENT JURISDICTION SHOULD BE EXERCISED AND HAS DECIDED THIS CASE CONTRARY TO DECISIONS OF THIS COURT.

At the outset it is pertinent to state that when two insurance companies issue policies where only one is allowed, a seemingly reasonable solution of the problem is to order both to share losses equally. However, this would only be an apparently reasonably solution, for it gives no consideration to whether a Federal Court has or should exercise jurisdiction, and, should there be jurisdiction, gives no consideration as to whether there are unresolved fact issues that, if resolved, would allow for a manifestly different result.

The District Court held that it could make no determination of liability for workmen's compensation benefits, that determination being solely within the province of Michigan Workmen's Compensation administrative agencies.[1] The circumstances of this case are such that Pacific Employers Insurance Company and Aetna Casualty and Surety Company will have a conflict only if the workmen's compensation liability is found to that of the Jim Robbins Company. The surviving interests of both Mr. Scarratt and Mr.

[1]Appendix A—p. 3a.

Curry are contending in other tribunals that there was no employment relationship between the deceased persons and the Jim Robbins Company at the time of death.

When it will take a determination from a Michigan administrative agency that the death of Mr. Scarratt or Mr. Curry occurred while he was acting in the employ of the Jim Robbins Company, and the circumstances indicate that such a decision may never come about, it would seem that presently it is doubtful that there is a case or controversy between Pacific Employers Insurance Company and Aetna Casualty and Surety Company.

It is plain from the recent decisions of this Court that if there is a case or controversy, declaratory judgment jurisdiction will be exercised by Federal Courts only if the issues are fit for judicial decision *and* there would be a hardship to the parties by withholding Jurisdiction. *Abbott Laboratories vs. Gardner*, 387 U.S. 136 (1967), *Toilet Goods Ass'n. vs. Gardner*, 387 U.S. 158 (1967), *Gardner vs. Toilet Goods Ass'n.*, 387 U.S. 167 (1967), *Golden vs. Zwickler*, 394 U.S. 103 (1969).

There is no issue here fit for judicial decision, for before the determination of the District Court can be meaningful a state administrative agency must decide liability, and the liability it decides may never put the interests of Pacific Employers Insurance Company and Aetna Casualty and Surety Company into contest. The contest is not ripe for decision and may never reach maturity.

There is no hardship to the parties by withholding jurisdiction. The administrative remedies afforded in the Michigan Department of Labor, have never been challenged as inadequate, or in any measure faulty. The incongruity of the present result is that it requires a state administrative decision before the Summary Judgment affirmed by the

Court of Appeals can be meaningful; and the state administrative procedure is wholly adequate to resolve any problems that can arise between the parties. The truth of this last clause could not be established more graphically that has been done by Pacific Employers Insurance Company, for in the state administrative proceeding where Scarratt's widow is seeking workmen's compensation benefits from Jebbco Corporation, Pacific has made Jim Robbins Company and Aetna Casualty and Surety Company parties.

There is no question that initial decision must be made by administrative agencies within the Michigan Department of Labor. The Judgment of the District Court so holds[2], and Pacific Employers Insurance Company agrees. *Public Service Commission* vs. *Wycoff Co.*, 344 U.S. 237 (1952) decided at p. 246:

> ". . . 'the declaratory judgment procedure will not be used to pre-empt and pre-judge issues that are committed for initial decision to an administrative body or special tribunal any more than it will be used as a substitute for statutory methods of review."

There can be no question that the decision of the Court of Appeals is directly contrary to the *Wycoff* decision.

The *Wycoff* case also concerned the conflicts between state and federal tribunals and administrative and judicial tribunals that can arise by unwarranted exercise of Federal Court Declaratory Judgment Jurisdiction. The Court of Appeals for the Sixth Circuit, in published opinions, has exercised great restraint in allowing declaratory judgment actions when there were possible state-federal or administrative-judicial conflicts. *Panhandle Eastern Pipline Co.* vs. *Michigan Consolidated Gas Co.*, 177 F2d 942

[2]Appendix A—p. 3a.

(CA6, 149); *Walker* vs. *Felmont Oil Corporation*, 240 F2d 912 (CA6, 1957) 262 F2d 163 (CA6, 1958); *American Airlines, Inc.*, v. *Louisville and Jefferson* C.A.B., 269 F2d 811 (CA6, 1959). There should be no difference in rulings that are reported and those that are made by Per Curiam Order.

The decision of the Court of Appeals for the Sixth Circuit deals with how Federal Court declaratory judgment jurisdiction should be exercised and is patently in conflict with *Public Service Commission* vs. *Wycoff Co.*, supra, *Abbott Laboratories* vs. *Gardner*, supra, *Toilet Goods Ass'n* vs. *Gardner*, supra, *Gardner* vs. *Toilet Goods Ass'n*, supra; and *Golden* vs. *Zwickler*, supra.

THE COURT OF APPEALS HAS ALLOWED A SUMMARY JUDGMENT TO STAND WHERE THERE ARE YET UNRESOLVED ISSUES OF FACT, REGARDING A REMEDY AFFIRMATIVELY SOUGHT BY A DEFENDANT THAT IS AVAILABLE UNDER APPLICABLE STATE LAW, THUS SANCTIONING A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

Petitioner sought reformation of the policies because of mistake of law by pleading for affirmative relief and alleging that the two policies were issued by an agent common to both insurance companies who thought a workmen's compensation risk could be shared.

The Michigan law, applicable here, clearly allows for reformation because of mistake of law. *McGraw* vs. *Muma*, 164 Mich. 118 (1910); *Walter* vs. *Walter*, 297 Mich. 26. (1941); *Moritz* vs. *Horsman*, 305 Mich. 627 (1943); *Stone* vs. *Stone*, 319 Mich. 194 (1947).

Petitioner's allegations for affirmative relief by way of reformation are not opposed in any way by any oath bearing evidence.

Granting Summary Judgment while there are unresolved fact issues involving the seeking of a well recognized and allowable remedy is contrary to the usual course of judicial proceedings, and such a departure from the norm was sanctioned simply by:

> "We conclude that the District Judge arrived at as satisfactory a solution as possible under the facts in this case."[3]

THE COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS ALLOWED A SUMMARY JUDGMENT TO STAND BASED UPON THE DISTRICT COURT'S CONCLUSION AS TO THE INTENT OF THE PARTIES WHEN THE AFFIDAVITS IN SUPPORT OF SUMMARY JUDGMENT AND THE DOCUMENTS IN EVIDENCE ALLOW FOR MORE THAN ONE INFERENCE AND THERE IS NO OATH BEARING EVIDENCE FROM THE PERSON WHOSE INTENT IS CRITICAL, THE AGENT COMMON TO BOTH INSURERS.

The District Court concluded that the policies issued expressed the intent of both insurers and that this intent was manifest from the policies and was that Aetna wanted only aircraft risks and Pacific wanted all the other risks.[4] The only portions of the policies in question that are even remotely pertinent to what risks the parties wished to take are Classifications of Operations statements (Exhibits C & D, attached to and part of Complaint). At least equal to the inference that Aetna wanted only aircraft risks and Pacific all the rest, is the inference, as pleaded by Aetna, that the agent common to both insurers wanted Aetna to insure what had been Commander Aviation, Inc. and Pacific to insure all of the other Jim Robbins enterprises.

The affidavits in support of the Motion for Summary

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[3]Appendix B—p. 7a.
[4]Appendix A—p. 4a.

Judgment were from the attorney for Pacific Employers Insurance Company and a claim representative, neither of whom purported to know anything about coverages intended at the time of issuance of the policies, because neither had anything to do with issuance of the policies.

It is patent that intent of the parties must deal with the agent common to both parties who in fact issued the policies with anomalous coverages. There is nothing from this person in the record, yet the District Court, sustained by the Court of Appeals, concluded that the matter was unquestionably determined by the intent of the parties.

Pacific Employers Insurance Company at one time contended that it was entitled to Summary Judgment because of the facts contained in an affidavit of the common agent, Henry Hollister, but there was no affidavit of Henry Hollister. Nonetheless, Pacific Employers Insurance Company was awarded Summary Judgment.

In opinions of the Court of Appeals for the Sixth Circuit published in the Federal Reporter, that Court consistently takes the position that on Motion for Summary Judgment, all inferences will be constructed in favor of the party opposing Summary Judgment and Summary Judgment can be awarded only when there are no unresolved, pertinent issues of fact. *Bohn Aluminum & Brass Corp.*, vs. *Storm King*, 303 F2d 425 (CA6, 1962) *S. J. Graves and Sons Company* vs. *Ohio Turnpike Commission*, 315 F2d 235 (CA6, 1953); *Williamson* vs. *Wilbur-Rogers Inc.*, 381 F2d 719 (CA6, 1967); *Hart* vs. *Johnson*, 389 F2d 239 (CA6, 1968); *DeWitt Motor Company* vs. *Chrysler Motors Corporation*, 391 F2d 912 (CA6, 1968). Yet here, Summary Judgment was sustained while there were allegations that would entitle defendant to a recognized remedy that were unopposed by any

oath bearing evidence, the policies in question at least equally allowed for the inference consistent with defendant's contention, and the affidavits in Support of the Summary Judgment granted did not purport to deal with the intent of the parties on issuance of the policies. Further, Summary Judgment was sustained on a conclusion of the District Court as to the intent of the parties, when the person whose intent was critical, the agent common to both insurers, had yet to utter one word under oath in this case.

Presenting equities to a trial Court, by the accepted and usual course of judicial proceedings, requires evidence. Here, the trial Court, sustained by the Court of Appeals, presumed to determine equity from pleadings and affidavits from persons who had no knowledge of the circumstances of the issuance of the policies. In determining that equity would not allow a reformation of policies, each of which covered all the loss, the trial Court, sustained by the Court of Appeals, then did reform by holding the loss be shared equally,[2] without one iota of evidence as to pertinent facts as how much premium did each insurer receive.

Summary Judgments are to be made only when there are no areas of fact dispute, and only issues of law remain, and this has been clearly demonstrated by the reported decisions of the Court of Appeals for the Sixth Circuit, cited above. To sanction Summary Judgment when there are unresolved fact questions, by a Per Curiam Order, is to depart from the accepted and usual course of judicial proceedings.

WHEREFORE, Petitioner prays that this Petition for a writ of certiorari to the United States Court of Appeals

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[2]Appendix A—p. 6a.

for the Sixth Circuit be granted so that this Court may correct a decision on a federal question now decided contrary to the decisions of this Court and exercise its power to supervise and correct departures from the accepted and usual course of judical proceedings.

Respectfully submitted,
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APPENDIX A

OPINION

(Filed August 14, 1968)

At a session of said Court held in Detroit, Michigan on the 14th day of August, 1969.

Present: Honorable Talbot Smith, United States District Judge.

This is an action for declaratory judgment pursuant to Section 2201, Title 28, United States Code, in which Plaintiff, Pacific Employers Insurance Company (hereinafter referred to as Pacific), seeks a determination by this Court as to its possible liability as a Workmen's Compensation Insurance carrier under the terms of a policy issued to the Jim Robbins Company by plaintiff.

The problem before this Court arose because of the simultaneous issuance of insurance policies by plantiff and defendant Aetna Casualty & Surety Company (hereinafter referred to as Aetna) to the Jim Robbins Company. Both policies were issued by Henry Hollister who acted as agent for both Aetna and Pacific. Although both parties admit that such dual coverage is contrary to Michigan law,[*1] plaintiff alleges that the situation arose because Pacific refused to insure risks arising out of the operation of aircraft while Aetna would insure only such risks. Defendant Aetna argues that a mistake of law caused agent Hollister to issue the simultaneous policies and seeks reformation of its policy.

In September, 1966, Jim Robbins and two alleged employees, Geoffrey Scarratt and Clair Curry, were killed in an airplane accident in South Dakota. Plaintiff requests

[*1] Workmen's Compensation Act, Part IV, Comp. Laws §§414.1-414.11, Mich. Stat. Ann. §17.195.

that with respect to any liability arising out of this accident that the Court find:

a) that Aetna is solely liable for any damages found to be owing to the dependents of Scarratt and Curry pursuant to the Workmen's Compensation Act;

b) that Pacific be held not liable for the damages by virtue of the expressed agreement of the parties, or

c) in the alternative, that the Court find pursuant to the Michigan Workmen's Compensation Act, Part V, Sections 414.1 through 414.14 that Pacific and Aetna have dual coverage and are equally responsible for any liability determined by the Workmen's Compensation Board.

Both companies moved for summary judgment. Motions for Summary Judgment filed by Aetna were heard and denied on October 14, 1968 and July 7, 1969.

The present motion for summary judgment was filed by Pacific and after oral argument and extensive briefing, was taken under advisement by the Court.

Aetna opposes the present motion on several grounds, but places its major reliance upon its position that there are two issues of fact to be litigated:

1) whether or not the deceased employees were in the course of their employment at the time of their deaths, and

2) whether the policies were issued as a result of a mistake of law on the part of the agent Hollister.

1) Whether or not the deceased employees were in the course of their employment at the time of their deaths?

We find the first ground asserted by Aetna to be entirely without merit and irrelevant to this cause. There is no dispute that an airplane accident occurred on September 26, 1966, and that in said accident Clair W. Curry and Geoffrey Scarratt sustained fatal injuries, and that Mr.

Curry and Mr. Scarratt left dependents. The questions of whether the accident was within the ambit of decedent's employment, whether the decedents were in fact acting in an employment relationship with the Jim Robbins Company, whether the dependents are entitled to compensation and in what amount, are all matters to be decided by the Workmen's Compensation Board and are *solely* within the jurisdiction of that Board. Workmen's Compensation Act, 12A Mich. Stat. Ann. §17.180, §6, Part III.

In addition, Aetna argues that a determination by this Court on the issues raised herein will prejudice the rights of the decedent's survivors in that they are seeking to enforce claims which are based upon the absence of any employment relationship between the decedents and the Jim Robbins Company. It is possible that a decision as to employment relationship will prejudice the rights of decedents' survivors. However, that decision will be made by the Workmen's Compensation Board and not by this Court. This Court will decide *only* which of two insurance companies is liable *in the event that liability is found to exist.* The conditions of liability must be found by the Board. It should also be noted that although decedents' survivors are represented by Counsel in this matter, the argument about possible prejudice to their rights was raised solely by Aetna.

2) Whether the policies were issued as a result of a mistake of law on the part of the agent Henry Hollister?

Aetna argues that Hollister, acting as agent for both it and Pacific, made a mistake of law in that he believed that separate policies of Workmen's Compensation insurance could be issued to separate divisions of the same corporation. Aetna alleges in its Answer to Plaintiff's complaint

(unsupported by Affidavit) that Hollister had formerly handled the insurance by Aetna for a company known as Commander Aviation, Inc. When that company was transferred to the Jim Robbins Company, Hollister believed. Aetna alleges (Answer, pp. 3-4, §12, 13) that it was proper to issue a separate policy covering the operation formerly known as Commander Aviation.

It is Pacific's position that the policies were issued as a result of the refusal of Aetna to assume liability for any claims arising out of the operation of aircraft and that consequently, the issuance of the policies clearly represented the intent of the parties involved.

Based upon its argument that a mutual mistake of law was made by the Agent, Aetna seeks a reformation of its policy. There are several difficulties with this position, however.

Reformation of an insurance policy may be had, in general, where by reason of fraud, inequitable conduct, or mutual mistake, the policy as written does not express the actual and real agreement of the parties. See, e.g. *Michigan Mut. Liability Co.* v. *Baker*, 295 Mich. 237, 284 N.W. 168 (1940); *Health Delivery Service* v. *Michigan Mut. Liability Co.*, 257 Mich. 472, 241 N.W. 168 (1932). In the situation before this Court, the policies as issued *do* express the intent of the parties, the only difficulty being that this is not a permissible intent under Michigan law. The parties clearly intended exactly what was sought to be accomplished. Pacific wanted to insure the Jim Robbins Company for everything except liability arising from the use of aircraft. Aetna wanted to insure Jim Robbins Company for aircraft liability only. It is obvious that in a normal situation, such limitation of risk would be

proper. However, in Michigan, a workmen's compensation insurance carrier, by statutory mandate, assumes *all* obligations imposed upon the employer by his acceptance of the Michigan Workmen's Compensation law as far as the payment of compensation, death benefits, or for medical or hospital care, are concerned, Workmen's Compensation Act, Part IV, Section 1 (e), Comp. L. 1948 §414.1(e), Mich. Stat. Ann. §17.195(e), and any attempt to vary these terms of its statutory contract of coverage or to limit its liability by provisions inconsistent with the Act are null and void. Part IV, Sec. 3, CL. 1948 §414.3, Mich. Stat. Ann. §17.197.

Secondly, assuming an innocent mistake on the part of Hollister, how could one or both of these contracts be reformed? The intent of the parties was obviously to limit liability to certain risks. This may not be done under the Workmen's Compensation Act and it is this Act, rather than the intent of the parties, which is binding upon this Court. *New Amsterdam Casualty Co.* v. *Moss*, 312 Mich. 459, 20 N.W. 2d 272 (1945). No amount of reformation could solve the conflict between the expressed intent of these parties and the provisions of the Workmen's Compensation Act.

There is no doubt that under the provisions of the Act itself, the portions of the policies here involved which purport to limit liability to certain risks, while excluding it as to other risks, are void and unenforceable. M.S.A. §17.197. The plaintiff candidly admits that independently of the agreement of the insurers and their agent—which agreement we find to be void—either company would be liable for any loss resulting from injuries suffered by an employee in the scope of his employment for the Jim Robbins Company.

In its prayer for relief, Pacific asks:

> "C. In the alternative, that this Honorable Court find pursuant to the Michigan Workmen's Compensation Act, Part IV, Sections 414.1 through 414.11 that the Pacific Employers' Insurance Company and the Aetna Casualty & Surety Company have dual coverage on the loss and are equally responsible to the heirs of Geoffrey G. Scarratt and Clair W. Curry for losses pursuant to the terms of the Workmen's Compensation Law", Complaint, p. 6.

Under the facts and circumstances of this case, we find this remedy to be most appropriate.

The equities presented to this Court do not indicate that one or the other insurance company is entitled to have its contract of insurance reformed so as to free it from liability in view of the fact that the policies were issued by a common agent in accordance with the intentions of the parties, however mistaken that agent was as to the law involved.

The contracts cannot be reformed so as to make them conform with Michigan law without placing an undue burden on one of the companies involved.[2] Under the facts before us, the companies should share an equal burden.

The plaintiff's Motion for Summary Judgment is granted.

Plaintiff is directed to file a suitable Order consistent with this Opinion within twenty (20) days.

Talbot Smith,
United States District Judge.

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[2] Since both companies filed an acceptance of risk with the Department of Compensation, we are not presented with the situation of *Buchans* v. *Central States Produce Corporation*, 313 Mich. 124, 20 N.W. 2d 835 (1945) in which the Court placed liability on the insurance company which filed the acceptance.

APPENDIX B.

(Title of Court and Cause)

Before PHILLIPS, Chief Judge, and EDWARDS and PECK, Circuit Judges.

This is a declaratory judgment action involving the liability of two insurance companies under the Michigan Workmen's Compensation law. Both companies were represented by the same agent. In violation of the Michigan statute, this agent wrote policies with both companies providing workmen compensation insurance for Jim Robbins Company as insured. *One policy provided for aviation coverage and the other did not list aviation activities.* Both policies were issued the same day and for the same period of time.

While both policies were in effect two employees were killed in the crash of an airplane owned by Jim Robbins Company and piloted by Mr. Robbins. *The widows of both of the victims claimed workmen's compensation benefits.* Each company denied liability and contends that the other is liable. However, Pacific Employees Insurance Company began paying compensation to the two widows promptly after the death of their husbands, under an agreement of reimbursement after ultimate determination of liability.

District Judge Talbot Smith held that each company is liable to the extent of fifty per cent of liability to the extent ultimately established by the administrative determination by the cognizant administrative officials of the State of Michigan. Both companies appeal.

We conclude that the District Judge arrived at as satisfactory a solution as possible under the facts in this case.

The judgment of the District Court is affirmed. Each party will pay its own costs on appeal.

Entered by order of the Court.

Carl W. Reuss,
Clerk.

APPENDIX C.

(Title of Court and Cause)

Before PHILLIPS, Chief Judge, and EDWARDS and PECK, Circuit Judge.

Upon consideration, it is ORDERED that the petitions for rehearing filed by Pacific Employers Insurance Company and Aetna Casualty & Surety Company be and hereby are denied.

Entered by order of the Court.

Carl W. Reuss,
Clerk.